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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 370

MAGNESIUM CASTING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (A. 200-212)¹ is reported at 427 F. 2d 114. The decision and order of the National Labor Relations Board in the unfair labor proceeding (A. 157-172, 185-186) are reported at 175 NLRB No. 68; the decisions in the related representation proceeding (A. 110-117, 131-136) are not officially reported.

JURISDICTION

The judgment of the court of appeals (A. 212) was entered on May 21, 1970. The petition for a writ of

¹ "A." refers to the joint Appendix heretofore filed with the Court. "App." refers to the Appendix at the end of this Brief. "Br." refers to petitioner's brief.

certiorari was filed on July 9, 1970, and granted on October 12, 1970 (A. 215). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE AND RULES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and of the Board's Rules and Regulations (29 C.F.R. 102.1, *et seq.*) are set forth in the Appendix, *infra*, pp. 29-39.

QUESTION PRESENTED

Section 3(b) of the National Labor Relations Act permits the Board to delegate to its regional directors the authority to make representation determinations, subject to discretionary review of those determination by the Board. The question presented is whether the Board nevertheless is required to give plenary review to a regional director's determination to include particular employees in the collective bargaining unit before it can base an unfair labor practice finding upon that determination.

STATEMENT

A. INTRODUCTION

Section 3(b) of the National Labor Relations Act, 29 U.S.C. 153(b) (App. *infra*, pp. 29-30), authorizes the National Labor Relations Board "to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining," as well as its other powers concerning representation issues. It further provides that,

upon request of an interested person, "the Board may review any action of a regional director delegated to him." The Board has adopted rules, based on this authority, delegating its powers to determine representation issues to its regional directors, subject to the right of a party to seek review by the Board.²

Upon the filing of a representation petition, Section 9(c)(1) of the Act (App., *infra*, pp. 30-31) provides that a hearing shall be held to determine if a question of representation exists and, if so, the appropriate bargaining unit and other election issues. On the basis of

² The rules regarding review (29 C.F.R. 102.67, App. *infra*, pp. 37-39) specify that:

(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (i) the absence, or (ii) a departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(d) Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record. With respect to ground (2), and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. * * *

(f) * * * Failure to request review shall preclude [the] parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmation of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

that hearing, an election may be directed; and, if a union prevails, it is certified as the employees' bargaining representative.

An employer who contests the validity of the election, including the unit determination, can obtain court review of his contentions only through an unfair labor practice proceeding under Section 10. He can refuse to bargain on the ground that the certification is invalid; if an unfair labor practice complaint issues and the Board ultimately finds that the refusal violated Section 8(a)(5) and enters an order to bargain, the employer may obtain review of that order and the underlying representation proceedings in the court of appeals, under Section 10(e) or (f) (App., *infra*, pp. 32-34). The record of the representation proceeding is before the court at that time under Section 9(d) (App., *infra*, p. 31). See *Boire v. Greyhound Corp.*, 376 U.S. 473.

B. THE REPRESENTATION PROCEEDING

On March 14, 1968, the Union³ filed a petition pursuant to Section 9(c) of the Act (App., *infra*, pp. 30-31) with the Board's regional director in Boston, requesting a representation election among the production and maintenance employees at petitioner's Hyde Park, Massachusetts plant⁴ (A. 4-5, 13). A hearing was held on the petition before a hearing officer designated by

³ United Steelworkers of America, AFL-CIO. The Union intervened in the court of appeals and thus is a party here.

⁴ At that plant, the Company is engaged in the manufacture and sale of various desk accessories and related products. Approximately 250 employees are included in the designated unit (A. 112).

the regional director, at which evidence was adduced, *inter alia*, concerning whether four individuals classified as "assistant foremen" were employees, and thus included in the unit, or were supervisors within the meaning of Section 2(11) of the Act (App., *infra*, p. 29), and thus excluded therefrom (A. 110, 112; 4, 14).

The evidence so adduced revealed the following: The Company's products division is divided into two sections, plating and finishing, and assembly and packaging, each of which consists of between 10 and 12 employees and is under the supervision of a foreman (A. 113-115; 16-17, 36-37). Each section is in turn divided into two smaller departments headed by the following assistant foremen: Raymond Zagrafos (metal finishing), Ivory Scott (electroplating), George Morris (one team of assembly and packaging), and Alonzo Massey (another team of assembly and packaging) (A. 16-17). These men are paid between 15 and 30 cents per hour more than the rank-and-file employees in their departments (A. 42), but 60 cents less than their respective foremen (A. 39). They attend bi-weekly "management" or "supervisory" meetings, which are also attended by all foremen in the products division, the assistant plant manager, and the assistant to the president; at these meetings, production, quality control, and personnel problems are discussed (A. 113-114; 17-18, 56, 98, 102-103).

Morris and Massey each have three or four employees working with them at any given time (A. 113;

49, 69). In addition to their regular production work, they insure that these employees are supplied with enough material to keep them busy, and inspect their work for inaccuracies, which they report to their foreman, Steinberg (A. 113; 50-51, 54, 64-65). Steinberg makes the daily work assignments (A. 113; 51, 66-67). He also checks the work of employees in the department, including that of Morris and Massey, every ten minutes during the day, and makes any necessary corrections (A. 113; 51-52, 65). Neither Morris nor Massey has ever hired, fired, or suspended an employee, or recommended any wage increases (A. 113; 51, 65).

Scott has two or three employees working with him (A. 114; 89). In addition to regular production, he engages in quality control work (A. 114; 23, 28-29), and, as a result of special training provided at Company expense, does chemical analysis for plating (A. 114; 29-30, 79). Scott testified that his foreman, Kabilian, assigns work to him and the other employees, and that the employees check with Kabilian if they are not coming to work or wish to take leave (A. 114; 81); he further testified that he had no authority to hire, fire, suspend, layoff, recall, promote, or discipline employees (A. 114; 82-83). A Company official testified, however, that Scott does have such authority, citing one incident when Scott told employee Washington, who had refused to do his job assignment and threatened to leave the plant, "if you leave don't come back," after which Washington returned to his job (A. 114-115; 17-19).

On the basis of the record developed by the hearing officer,⁵ the regional director concluded that Massey, Morris, and Scott were employees, rather than supervisors, and included them in the unit. In support of his conclusion regarding Massey and Morris, the director found that their "primary function is to keep the women supplied with work, to inspect the products and to refer any defective materials to Steinberg," who "is continually in the area and repeatedly checks the work of Massey and Morris as well as the work of the women in this department"; that they have "no authority to hire, fire, suspend, promote, transfer or discipline employees, nor do they responsibly direct any employee or otherwise engage in conduct which would affect the employment status of any employee in their department"; and that their attendance at the bi-weekly management meetings was not sufficient to make them supervisors, since the "primary function of these meetings" was "to discuss production problems" (A. 113-114). As to Scott, the director found that, while his training in electroplating "makes him more experienced in this operation than any one else in his department," his work was "of a routine nature" and closely supervised by Foreman Kabilian; that Scott "did not have authority to hire, fire, suspend, layoff, recall, promote, discipline or otherwise engage in any course of conduct which would affect the employment status of any

⁵ Since the facts were largely undisputed, the director was not required to resolve credibility issues, contrary to petitioner's intimation (Br. 14). The director accepted petitioner's version of Scott's authority (*infra*, p. 8).

employee in his department"; and that, assuming that Scott warned an employee on one occasion, "this incident is too isolated [on which] to predicate a finding of supervisory status" (A. 114-115).⁶

On May 22, 1968, the director ordered that an election be conducted in a unit consisting of all the Company's production and maintenance employees, including Massey, Morris, and Scott (A. 116-117). The Company was also directed to furnish a list containing the names and addresses of the eligible voters, which, pursuant to the Board's decision in *Excelsior Underwear, Inc.*,⁷ would be made available to the Union (A. 117, n. 3).

The Company filed with the Board a request for review of the regional director's decision and direction of election, contending that his ruling "on the factual issue of the supervisory status of employees" Scott, Massey, and Morris "is clearly erroneous on the record and such error prejudicially affects the rights of the Employer" (A. 118). The request for review contained a detailed recital of the record evidence respecting the duties of these individuals which the Company believed supported its contentions, and a full discussion of the relevant legal authorities (A.

⁶ The fourth assistant foreman, Zagrafos, was found to be a supervisor and thus was excluded from the unit. The director relied on the fact that Zagrafos testified without contradiction that he spends 80 percent of his time doing supervisory work, effectively recommended three people for wage increases, fired another employee, grants employees time off, transfers them between departments, assigns them to jobs, and orders them to make corrections (A. 115; 96-99).

⁷ 156 NLRB 1236.

118-127). On June 18, 1968, the Board denied the Company's request for review, on the ground that it raised no substantial issues warranting review (A. 127).

The election was conducted on June 21, 1968, and resulted in 140 votes for, and 59 votes against, the Union, with 1 challenged ballot (A. 131).⁸ The Company filed an objection to the election, asserting that the *Excelsior* list requirement, with which it had complied under protest, was invalid (A. 131-133).⁹ On October 11, 1968, the director overruled the Company's objection to the election and certified the Union as the exclusive bargaining representative of the Company's employees (A. 131-136).¹⁰

⁸ Petitioner argues (Pet. 9-10) that, if the assistant foremen were "supervisors," their participation in the Union's organization drive would have been improper under established principles. It is for this reason that the Company challenged the determination of the status of the assistant foremen: since the Union won the election by a substantial margin, their individual votes were not decisive.

⁹ The Company relied on the First Circuit's decision in *Wyman-Gordon Co. v. National Labor Relations Board*, 397 F. 2d 394, holding that the Board's *Excelsior* requirement had been promulgated in violation of the Administrative Procedure Act. This decision was subsequently reversed by this Court. *National Labor Relations Board v. Wyman-Gordon Co.*, 394 U.S. 759.

¹⁰ The Company had previously obtained an injunction from the United States District Court for the District of Massachusetts, enjoining the director from certifying the results of the election pending the final disposition of the petition for a writ of certiorari which the Board had filed in *Wyman-Gordon*, n. 9, *supra*. On September 10, 1968, the First Circuit vacated the injunction on the ground that the Company, by supplying the *Excelsior* list, had waived its right to contest the validity of that requirement. *Hoban v. Magnesium Casting Co.*, 401

C. THE UNFAIR LABOR PRACTICE PROCEEDING

When the Company then refused to bargain, the Union filed an unfair labor practice charge with the Board. A complaint issued alleging that the Company's refusal violated Section 8(a)(5) and (1) of the Act (A. 138-141). In its answer the Company denied that it had refused to bargain and asserted again that Scott, Morris, and Massey were "supervisors" and that the *Excelsior* requirement was invalid (A. 145-146).

The general counsel of the Board moved for summary judgment, in response to which the Company renewed its earlier contentions and alleged that it had newly discovered evidence regarding Scott's supervisory status and his activities on behalf of the Union (A. 147-157). In support of the latter, the Company offered to show, *inter alia*, that Scott (1) "admittedly withheld information in the representation proceeding concerning his full responsibilities and authority as an assistant foreman"; (2) "had the authority to and often did independently exercise such authority to" perform certain enumerated functions evidencing supervisory status; and (3) was asked by the Union to solicit authorization cards on its behalf, which he openly did (A. 155-156).

The trial examiner granted the general counsel's motion for summary judgment (A. 157-165), noting that in the absence of newly discovered evidence or

F. 2d 516, certiorari denied, 393 U.S. 1065 (A. 128-130). The Company requested the Board to delay action on the certification pending disposition of its certiorari petition in the injunction action, which the Board refused to do (A. 136-138)

other special circumstances, established Board policy prohibited litigation in an unfair labor practice case of issues which were, or could have been, litigated in a prior representation proceeding (A. 163-164). He found that the only "newly discovered" evidence offered by the Company was its assertion that Scott admitted, after the hearing, that he had supervisory authority; and that, since no support for this assertion was furnished, it appeared the Company was merely attempting by this means to relitigate matters decided in the representation proceeding (A. 164). Finally, the examiner rejected as legally irrelevant any evidence concerning Scott's participation in the solicitation of authorization cards, since in the representation proceedings he was found to be an employee, and not a supervisor (A. 164-165).

The Company excepted to the trial examiner's findings and conclusions (A. 172-184). The Board affirmed the examiner's decision, adopted his finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and ordered the Company to bargain with the Union upon request (A. 185-186).

The Company filed a motion for reconsideration with the Board, asserting that, under the intervening decision in *Pepsi-Cola Bottling Co. v. National Labor Relations Board*, 409 F. 2d 676 (C.A. 2), certiorari denied, 396 U.S. 904, the Board must review the regional director's representation determination and decide if that determination was correct before issuing an unfair labor practice order based thereon (A. 186-190). The Board denied the Company's motion, noting

its disagreement with *Pepsi-Cola* (A. 190-191). It subsequently denied the Company's motion to reopen the record for additional evidence concerning the turnover of employees and the expansion of the unit (A. 192-195).

D. THE COURT OF APPEALS DECISION

The court of appeals enforced the Board's order (A. 212). It ruled that substantial evidence supported the regional director's determination that Scott, Morris, and Massey were employees, rather than supervisors (A. 201-205). The court did not require plenary Board review of that determination concluding that "the procedure followed by the Board in this case satisfies the requirements of the National Labor Relations Act, the Administrative Procedure Act, and the demands of procedural fairness" (A. 211).

SUMMARY OF ARGUMENT

Section 3(b) of the Act permits the Board to delegate to its regional directors its powers in representation proceedings. Pursuant to this provision, the Board has adopted rules authorizing its regional directors to make representation determinations, subject to discretionary review by the Board. Here the Board denied review of a regional director's representation determination and an unfair labor practice proceeding ensued because the Company refused to bargain. The question is whether in the unfair labor practice proceeding the Board may, absent special circumstances not here present, properly adopt the regional director's determination without further review.

The court below correctly concluded that the Board need not review the regional director's determination *de novo* in the unfair labor practice proceeding. Both the language and the legislative history of Section 3(b) indicate that Congress intended to vest regional directors with final authority over representation proceedings, subject only to discretionary review by the Board. The fundamental congressional objective in doing so was to expedite the handling of election cases. This objective would be substantially frustrated if the Board were required to give plenary consideration to a representation determination before that determination could be adopted in a related unfair labor practice proceeding.

The procedure approved by the court below affords ample opportunity for the Board to determine the validity of the regional director's representation determination. Moreover, the court of appeals carefully reviewed the findings of the regional director and the Board, and concluded that they were supported by substantial evidence.

ARGUMENT

Since early Wagner Act days, it has been established that, absent newly discovered evidence or other exceptional circumstances, the employer is not entitled to relitigate in an unfair labor practice proceeding any issues which were, or could have been, litigated and determined in an earlier related representation proceeding. As the Court explained in *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 313 U.S. 146, 158, 162, the representation and

unfair labor practice proceedings "are really one [and] a single trial of the [representation] issue [is] enough."

Until 1959, the issues in a Section 9 representation proceeding as well as those in a Section 10 unfair labor practice proceeding were determined by the Board itself. In that year Congress amended Section 3(b) (App., *infra*, pp. 29-30) to provide:

* * * The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purposes of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot * * * and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph * * *.

Pursuant to this authorization, the Board has delegated its powers to determine representation issues to its regional directors. The procedures adopted by the Board provide that in such cases the regional director shall order a hearing before a hearing officer (29 C.F.R. 102.63, 102.64, App., *infra*, pp. 34-36). On the basis of the record developed at the hearing, the regional director determines "the unit appropriate for purpose of collective bargaining, [and] whether a question concerning representation exists, and * * * direct[s] an election * * * or make[s] other disposition of the matter" (29 C.F.R. 102.67(a) App., *infra*,

p. 36).¹¹ The decision of the regional director "shall set forth his findings, conclusions, and order or direction," and "shall be final" unless a request for review is filed with the Board (29 C.F.R. 102.67(b) App., *infra*, p. 37).¹²

The question in this case is whether the Board may properly apply the settled principle barring relitigation in a related unfair labor practice proceeding of issues determined in the representation proceeding where, as here, the representation determination is made by the regional director pursuant to the delegation permitted by Section 3(b) of the Act, and the Board declines review of, and thereby summarily affirms, the director's decision. The court below and the Tenth Circuit¹³ say yes; the Second Circuit, however, has required that in such circumstances the Board, "before taking the serious step of declaring that an employer has committed an unfair labor practice," must "review the record before the Regional Director to determine whether his decision was correct, and not merely

¹¹ The matter may be referred directly to the Board: "In any case in which it appears to the regional director that the proceeding raises issues which should be decided by the Board, he may, at any time, issue an order, to be effective after the close of the hearing and before decision, transferring the case to the Board." 29 C.F.R. 102.67(h) (App., *infra*, p. 39).

¹² Petitioner suggests (Br. 13-14) that because the regional director does not preside at the hearing he may not be familiar with the record there developed. The pertinent rules refute this assertion: the director must base his determination on this record and specifically is required to set forth his findings and conclusions (29 C.F.R. 102.67(a), (b), App., *infra*, pp. 36-37).

¹³ *Meyer Dairy, Inc. v. National Labor Relations Board*, 429 F. 2d 697, 699-700.

whether it was clearly erroneous." *Pepsi-Cola Bottling Co. v. National Labor Relations Board*, 409 F. 2d 676, 681, certiorari denied, 396 U.S. 904.¹⁴

1. THE BOARD'S REFUSAL, IN THE ABSENCE OF SPECIAL CIRCUMSTANCES, TO REVIEW DE NOVO IN THE UNFAIR LABOR PRACTICE PROCEEDING ISSUES WHICH IT PREVIOUSLY DECLINED TO REVIEW AFTER DETERMINATION BY THE REGIONAL DIRECTOR IN THE REPRESENTATION PROCEEDING IS SANCTIONED BY AND FURTHERS THE PURPOSE OF THE 1959 AMENDMENT TO SECTION 3 (b) OF THE ACT

The 1959 amendment to Section 3(b) of the Act authorizes the Board to delegate to its regional directors its powers to determine representation questions, subject only to discretionary Board review. On its face, this amendment indicates a congressional purpose to endow the regional director with all the powers which the Board previously exercised in a Section 9 proceeding, subject to such review as the Board might provide. The Board's power in a representation proceeding was to decide bargaining unit and other election issues; absent special circumstances, its decision on such issues was not subject to relitigation in subsequent unfair labor practice proceedings. *Pittsburgh*

¹⁴ In subsequent cases the Second Circuit has narrowed its decision, so that plenary Board review is required only when an issue "is difficult and requires a fine-drawn balancing of facts and law." *National Labor Relations Board v. Olson Bodies, Inc.*, 420 F. 2d 1187, 1190, petition for a writ of certiorari pending, No. 238, this Term; *National Labor Relations Board v. Bayliss Trucking Co.*, October 28, 1970, 75 LRRM 2501, 2504. In both *Olson* and *Bayliss*, the Board's order was enforced even though the Board did not give plenary consideration to the regional director's representation determination.

*Plate Glass Co. v. National Labor Relations Board, supra.*¹⁵ Since Section 3(b) places the regional director in the Board's shoes, it follows that, absent special circumstances, the Board is not required to reconsider, in the subsequent unfair labor practice proceedings, the determination of the regional director made in the representation proceedings.

The fact that the amendment refers only to Section 9 does not, as petitioner would have it (Br. 18, 24-25), prevent that amendment from having any impact on other sections of the Act. As the court below recognized, petitioner's argument "overlooks the well established principle that when the Board resolves an issue in a representation proceeding under its section 9 powers, it is *not* required to reconsider the same issue and evidence in the ensuing unfair labor practice proceeding under section 10," citing *Pittsburgh Plate Glass*. The court correctly added: "Since the section 3(b) amendment delegated to the Regional Directors the Board's powers to make unit determinations in representation proceedings, we think it follows that the Director's determination—when not set aside by the Board—is entitled to the same weight in the subsequent [unfair labor practice] proceeding

¹⁵ Although in *Pittsburgh Plate Glass* the Board itself had ruled on the representation issue—since then the Board was not authorized to delegate such matters to its regional directors—the thrust of the Court's decision was that, because the representation issue had been fully litigated once (in the representation proceeding), further litigation on that issue (in the unfair labor practice proceeding) would only be cumulative. 313 U.S. at 162. That the Board itself ruled in the earlier representation proceeding was not essential to the Court's decision.

that the Board's own determination would have been accorded." (A. 207.)

The legislative history of Section 3(b) confirms this analysis. Senator Goldwater, a member of the House-Senate Conference Committee, stated:¹⁶

[Section 3(b)] is a new provision, not in either the House or Senate bills, *designed to expedite final disposition of cases by the Board, by turning over part of its caseload to its regional directors for final determination.*

Under this provision, the regional director can exercise no authority in representation cases which is greater or not the same as the statutory powers of the Board with respect to such cases. In the handling of such cases, the regional directors are required to follow the lawful rules, regulations, procedures, and precedents of the Board and *to act in all respects as the Board itself would act.*

* * * * *

*This authority to delegate to the regional director is designed, as indicated, to speed the work of the Board * * * .* [Emphasis added.]¹⁷

¹⁶ II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (GPO, 1959) 1856 (hereinafter cited as "Leg. Hist.").

¹⁷ Representative Kearns further explained (II Leg. Hist. 1749-1750):

* * * The Board is authorized to delegate to its regional directors the processing of representation cases. Such cases account for more than 50 percent of the Board's workload. During the early years of the NLRA, the Board undoubtedly needed to handle these cases by itself. More than 20 years later the rules of decision are well established and nearly all of the cases are decided on established precedent. To make certain Board policy is followed by regional directors, provision is made for appeal to the Board. Action of the Director is not

The basic congressional objective was to authorize delegation of representation case powers to the regional directors, in order to expedite the handling of election cases and, by reducing the workload of the Board, of other cases as well. To achieve this objective, Congress was willing to permit the Board to give its regional directors the power "to act in all respects as the Board itself would act" and make a "final determination" of representation issues, subject to such review as the Board might provide. Congress recognized that this would vest the regional directors with important powers,¹⁸ but concluded that the overall

stayed pending the appeal, however, to avoid the taking of an appeal as a delaying technique. This change of procedure will materially decrease the time spent in processing representation cases and eliminate advantages which parties have long sought to obtain by delays. It should therefore encourage consent elections and reduce the number of formal proceedings.

Representative Udall stated (II Leg. Hist. (1722):

*** The conferees *** adopted *** provisions which will enable the NLRB to handle more cases, and to handle them more expeditiously, by decentralizing its supervision of elections.

Representative Barden added (II Leg. Hist. (1812):

*** [I]t is clearly intended that the regional directors in making any decisions or rulings pursuant to a delegation permitted by that section would be subject to and bound by the various precedents and rules and regulations established by the Board, and furthermore, an appeal to the Board is provided to prevent and/or remedy any abuse of discretion or departure from Board precedent or Board rules and regulations by the regional directors.

¹⁸ Indeed, for this reason, it was suggested by some legislators that the regional directors should be appointed by the President and confirmed by the Senate, as are the members of the Board. See II Leg. Hist. 1452 (Senator Dirksen), 1460 (Senator Goldwater). This suggestion was not adopted.

need to expedite case handling justified this step,¹⁹ particularly since safeguards and discretionary Board review were provided. In the words of the court below (A. 209):

[T]he section 3(b) delegation of authority to the Regional Directors suggests to us a Congressional judgment that the Regional Directors have an expertise concerning unit determinations sufficiently comparable to the Board's expertise that such determinations may be left primarily to the Regional Directors, subject to the Board's discretionary review. Given this determination that the Board's expertise need only be fully brought to bear on those unit determinations which the Board chooses to review, no unfairness arises from the fact that the Regional Director's determination, after denial of review by the Board, is adopted by the Trial Examiner and the Board in the ensuing unfair labor practice proceeding.²⁰

¹⁹ The Board's ability to delegate its representation functions to its regional directors has significantly lightened the Board's case load. In fiscal year 1969, a total of 1,999 formal representation decisions were issued either directing elections or dismissing election petitions: 1,872 of these were rendered by regional directors, and 127 by the Board (100 on direct transfer from the regional directors for initial decision and 27 on grant of a request for review of the regional director's decision). 34th Annual Report of the National Labor Relations Board 201, Table 3B (GPO, 1970). The Board, prior to the 1959 amendment, would have decided all of these cases.

²⁰ Nor does it follow, as petitioner asserts (Br. 25-26, n. 7), that because Congress in 1961 rejected Reorganization Plan 5—which would have permitted the Board to delegate its powers in all unfair labor practice cases to its trial examiners, subject to discretionary Board review—Congress intended that representation determinations by the regional directors should be

Thus the decision of the regional director, made in the delegated exercise of the Board's "powers under Section 9 to determine" representation questions (Section 3(b)), is final (unless the Board reviews it) not only for purposes of the representation proceeding but also in a subsequent unfair labor practice proceeding in which the representation determination is challenged. This not only is a matter of logic; it also is supported by sound practical considerations.

To hold that the Board must, in those cases where it has not granted review in the representation proceeding and the issue is difficult, give plenary consideration to the record of that proceeding when the case comes before it in an unfair labor practice proceeding—as the Second Circuit has done²¹—would subvert plenary review by the Board at the unfair labor practice stage. There simply is no indication that in rejecting Reorganization Plan 5 Congress intended to diminish in any respect the power which it had previously conferred on the Board by Section 3(b) to delegate the determination of representation issues to its regional directors.

²¹ The recent attempts by the court to limit its *Pepsi-Cola* rule to "difficult" issues involving "a fine-drawn balancing of facts and law" (n. 14, *supra*) has no support in the legislative history of Section 3(b) or in the overall scheme of the Act. As the court below observed (A. 211):

We shrink from the prospect of attempting such characterizations; in the case before us involving the issues of "supervisory" status, the question seemed difficult only with regard to one of the three assistant foremen. Perhaps the Board determined, in its expertise, that the issues here presented were *not* difficult ones when it concluded that the Company's contentions presented no issue warranting review. Are we now to tell the Board that we think it was wrong with regard to one of the three men, that it must review his status because we think the question a close one? Surely that approach would frustrate rather than foster the expeditious disposition of cases intended by Congress * * *.

stantially impair the purpose Congress sought to achieve in amending Section 3(b). For it would make the regional director's decision "final" only where the representation proceeding does not culminate in unfair labor practice proceedings. If the employer refuses to bargain in order to test the director's representation determination,²² the Board would be required in the ensuing unfair labor practice proceeding to review the record *de novo* and "make its own determination as to whether the Regional Director's decision was right" (*Pepsi-Cola, supra*, 409 F. 2d at 682), even though it had satisfied itself in an appellate capacity during the representation proceeding that the regional director's decision did not warrant review.

This result would contravene the language and clear intent of Section 3(b), which provides that representation determinations by the regional directors shall be subject only to discretionary Board review. Moreover, far from expediting the disposition of cases and reducing the Board's workload, as Congress, intended, it would force the Board to look twice at each representation case which culminates in an unfair labor practice proceeding, a result Congress hardly intended.

To be sure, the Second Circuit's holding would still permit an election to be held expeditiously, since the required plenary Board review of the regional director's representation determination is deferred until

²² Potentially every representation case is in this category, since an employer can obtain judicial review of a representation determination only by triggering an unfair labor practice proceeding.

the unfair labor practice proceeding. But where the employer elects to contest a certification, no bargaining relationship—the desired end result—is established unless and until the Board has issued a bargaining order and that order is enforced by a court of appeals. By delaying the conclusion of the unfair labor practice proceeding, the Second Circuit requirement substantially dissipates the benefits derived from a prompt handling of the representation proceeding.²³

II. THE BOARD'S PROCEDURE PROVIDES ADEQUATE PROTECTION TO THE INTERESTS OF RESPONDENTS IN BOARD PROCEEDINGS, AND SUCH PROTECTION WAS FULLY ACCORDED TO THE COMPANY IN THIS CASE

The Board's procedure affords ample opportunity for the Board to determine the validity of the regional director's determination in the representation proceeding without mandatory *de novo* Board review, either in that proceeding or later. In determining whether to grant review of a representation determination, the Board has before it the regional director's decision, which includes his findings and conclusions, and the request for review. The request must contain a detailed analysis of the evidence and the legal principles and cases upon which the request-

²³ In the period January through June 1970, the median time between the filing of a representation petition and decision by the regional director was 48 days; where a decision by the Board occurred (either on direct transfer or on review), the median time was 245 days. If plenary Board review were required in all unfair labor practice cases in which the representation determination is in issue, the time added would undoubtedly exceed even the present disparity, since the Board, with a larger caseload, would take longer to reach a case.

ing party relies. 29 C.F.R. 102.62(d) (App., *infra*, p. 38). When the Board grants review it is because it has been shown that compelling reasons exist therefor—as, for instance, where the regional director's factual determinations are clearly erroneous. 29 C.F.R. 102.62(c) (App., *infra*, pp. 37–38). But where, as here, the Board—after considering the detailed request for review and the regional director's decision—concludes that the requesting party has not shown compelling reasons for Board review, it will not grant it. The Board's rules (n. 2, par. (f), p. 3, *supra*) state: "Denial of a request for review shall constitute an affirmance of the regional director's action * * *."

The court below properly observed that "[i]n effect, the procedure enables the protestant to marshal its facts and law relevant to the point in issue. If the Board chooses to deny review, its action is one informed by a focused presentation. It cannot fairly be called rubber stamping, with the blind automaticity which the term connotes." A. 210, n. 5. As the court added, in these circumstances, "[i]t is difficult to see in what respect a review of the actual record would have added to the Board's comprehension of the Company's contentions." A. 210.²⁴

²⁴ The Board's procedure for discretionary review of the regional director's representation determination is, contrary to the view expressed in *Pepsi-Cola* and petitioner's similar assertion (Br. 21–22), essentially equivalent to the procedure involved in *National Labor Relations Board v. Duval Jewelry Co.*, 357 U.S. 1. In *Duval Jewelry*, this Court approved the Board's action in delegating to a hearing officer its power to rule on petitions to revoke subpoenas, because the officer "does not * * * have the final word"; "[u]ltimate decision on the merits of all the issues coming before him is left to the Board." *Id.* at 8. The procedure by which the Board reserved the "final word"

The Board's procedure does not, as petitioner contends (Br. 26-29), deprive it of the right to a complete record on which to obtain judicial review of the Board's unfair labor practice order and the underlying representation certification.²⁵ The party charged in the subsequent unfair labor practice proceeding may contest before the Board issues not fully litigated in the earlier representation determination; here the Company attempted to do so, by proffering, in response to the summary judgment motion²⁶ in the subsequent proceeding, evidence which it alleged was

in *Duval Jewelry*, like the procedure here in question for review of a regional director's representation determination, gives the person aggrieved only the right to request Board review; such permission is granted only if a substantial issue is presented. In approving such procedure the Court stated (*id.* at 7):

The fact that special permission of the Board is required for the appeal is not important. Motion for leave to appeal is the method of showing that a substantial question is raised concerning the validity of the subordinate's ruling. If the Board denies leave, it has decided that no substantial question is presented * * *.

²⁵ The Administrative Procedure Act, 5 U.S.C. 557(c), on which petitioner relies, provides in relevant part: "All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—(A) findings and conclusions, and the reasons or basis therefor, and all the material issues of fact, law, or discretion presented on the record * * *."

²⁶ Petitioner suggests (Br. 15-16) that the Board's summary judgment procedure violates the requirement for separation of Board and general counsel functions. But the general counsel determines whether to move for summary judgment on the basis of whether the complaint and answer in the unfair labor practice case show that there are no unresolved issues of fact requiring further hearing, and not on the merits of the regional director's decision. Moreover, the general counsel's summary judgment motion is decided by the trial examiner and the Board, both of which are independent of the regional director and the general counsel.

newly discovered. Only after considering fully the regional director's representation determination and the Company's objections to that determination and the purported "new evidence"²⁷ did the trial examiner, and later the Board, finally adopt the director's determination. Since the Board's unfair labor practice order was grounded on the prior representation determination, the record of that prior proceeding was included in the transcript filed in the court of appeals, and thus was before the court for its review—as Section 9(d) (App., *infra*, p. 31) expressly requires.

As the court below correctly stated (A. 210–211):

* * * [B]oth Senator Goldwater's remarks [concerning the adoption of Section 3(b), p. 18, *supra*] and the Board's own rules make clear that the Regional Director is required to follow the same rules as the Board, so that findings of fact by him must be forthcoming. 29 C.F.R. § 102.67(b). Moreover, the Board's rules make clear that the Regional Director's determinations, if adopted by the trial examiner in

²⁷ The only purported newly discovered evidence was the unsupported allegation that Scott had withheld information concerning his supervisory authority during the representation proceeding. As the court below properly concluded, "because of the great potential for delay through this avenue, it is not unfair to require the offeror of such belated evidence to spell out what he has and why he has not produced it at the appropriate time. The Company's first proffer merely stated that Scott had 'admittedly withheld information * * * concerning his full responsibilities and authority as an assistant foreman,' without in any way indicating what that information was. The Company's other offers of proof seem clearly to address matters within its knowledge at the representation hearing, with no explanation as to why such proof was not then offered. * * *" (A. 205).

the unfair labor practice proceeding, will accompany the case first to the Board—29 C.F.R. § 102.45(a)—and then to the appropriate court of appeals. 29 C.F.R. § 101.14; 29 U.S.C. § [9] (d). In the case presently before us, the Regional Director's findings of fact which had been adopted by the trial examiner and by the Board were as complete and "reviewable" as any we have received from the Board. * * * ²⁸

Indeed, here the court carefully reviewed the representation findings of the regional director and concluded that they were supported by substantial evidence (A. 202-205).

In sum, at each stage of the proceedings here the Company has been afforded ample opportunity to present its views to the Board and the court of appeals, and those views were fully and carefully considered.

²⁸ The First Circuit's subsequent decision in *National Labor Relations Board v. Lowell Corrugated Container Corp.*, No. 7568, September 30, 1970, 75 LRRM 2346, to which petitioner directs attention (Br. 16-17), is distinguishable from the present case. There the trial examiner refused in the unfair labor practice proceeding to consider the evidence on which the regional director made his representation determination, as did the Board in affirming the examiner's ruling; unlike the present case, the Board had not previously considered the representation determination in any manner, since it had not been requested to do so. The *Lowell* court itself found, on its review of the entire record, that the director's determination was supported by substantial evidence and accordingly enforced the Board's bargaining order based thereon. Indeed, in this respect the *Lowell* decision is in complete harmony with the decision below; in the present case, the court reviewed the record of the representation proceeding and concluded that "the Regional Director's determination with regard to [the supervisor issue] is supported by substantial evidence." A. 205.

CONCLUSION

The judgment of the court of appeals enforcing the Board's order should be affirmed.²⁹

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JANUARY 1971.

²⁹ The petitioner urges (Br. 29-30) that the case should, in any event, be remanded to the Board to determine whether, in view of the lapse of time and the resultant employee turnover, a bargaining order is still appropriate. The court below properly rejected this suggestion since the delay is attributable to the Company's unfair labor practice in refusing to bargain with the Union (A. 212). See *National Labor Relations Board v. Gissel Packing Co.*, 395 U.S. 575, 610-611.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C 151, *et seq.*) are as follows:

SEC. 2 * * *

(11) the term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

SEC. 3 * * *

(b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not,

unless specifically ordered by the Board, operate as a stay of any action by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed. * * *

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for col-

lective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * *

SEC. 10. * * * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing

before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon

the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

The relevant provisions of the Board Rules and Regulations (29 C.F.R. 102.63, *et seq.*) are as follows:

SEC. 102.63. *Investigation of petition by regional director; notice of hearing; service of notice; withdrawal of notice.*—(a) After a petition has been filed under section 102.61(a), (b), or (c), if no agreement such as that provided in section 102.62 is entered into and if it appears to the regional director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the act will be effectuated, and that an election will reflect the free choice of employees in the appropriate unit, the regional director shall prepare and cause to be served on the parties and on any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein. A copy of the petition shall be served with such notice of hearing. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on his own motion.

(b) After a petition has been filed under section 102.61 (d) or (e), the regional director shall conduct

an investigation and, as appropriate, he may issue a decision without a hearing; or prepare and cause to be served on the parties and on any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein; or take other appropriate action. If a notice of hearing is served, it shall be accompanied by a copy of the petition. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on his own motion. All hearing and posthearing procedure under this subsection (b) shall be in conformance with sections 102.64 through 102.68 whenever applicable, *except* where the unit or certification involved arises out of an agreement as provided in section 102.62(a), the regional director's action shall be final, and the provisions for review of regional director's decisions by the Board shall not apply. Dismissals of petitions without a hearing shall not be governed by section 102.71. The regional director's dismissal shall be by decision, and a request for review therefrom may be obtained under section 102.67, except where an agreement under section 102.62(a) is involved.

SEC. 102.64 *Conduct of hearing.*—(a) Hearings shall be conducted by a hearing officer and shall be open to the public unless otherwise ordered by the hearing officer. At any time a hearing officer may be substituted for the hearing officer previously presiding. It shall be the duty of the hearing officer to inquire fully into all matters in issue and necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties under section 9(c) of the act.

(b) The hearing officer may, in his discretion, continue the hearing from day to day, or adjourn it to a later date or to a different place, by announcement thereof at the hearing or by other appropriate notice.

* * * * *

SEC. 102.67. *Proceedings before the regional director; further hearing; briefs; action by the regional director; appeals from action by the regional director; statement in opposition to appeal; transfer of case to Board; proceedings before the Board; Board action.*—(a) The regional director may proceed, either forthwith upon the record, or after oral argument, or the submission of briefs, or further hearing, as he may deem proper, to determine the unit appropriate for the purpose of collective bargaining, to determine whether a question concerning representation exists, and to direct an election, dismiss the petition, or make other disposition of the matter. Any party desiring to submit a brief to the regional director shall file the original and one copy thereof, which may be a typed carbon copy, within 7 days after the close of the hearing: *Provided, however,* That prior to the close of the hearing and for good cause, the hearing officer may grant an extension of time not to exceed an additional 14 days. Copies thereof shall be served simultaneously on all other parties to the proceeding. Requests for additional time in which to file a brief under authority of this section not addressed to the hearing officer during the hearing shall be made to the regional director, in writing, and copies thereof shall immediately be served on the other parties. Requests for extension of time shall be received not later than 3 days before the date such briefs are due in the regional office. No reply brief may be filed except upon special leave of the regional director.

(b) A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the regional director shall be final: *Provided, however, That* within 10 days after service thereof any party may file eight copies of a request for review with the Board in Washington, D.C. Such request shall be printed or otherwise legibly duplicated: *Provided, however, That* carbon copies shall not be filed and if submitted will not be accepted. Copies thereof shall be served simultaneously on all other parties to the proceeding and the regional director in the same manner used to file with the Board, except that if personal service is made upon the Board, service upon the other parties shall be made in such manner as would reasonably insure receipt by the other parties within 3 days after the date of service upon the Board. A statement of such service shall be filed simultaneously with the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of any action taken or directed by the regional director: *Provided, however, That* the regional director, in the absence of a waiver, may issue a notice of election but shall not conduct any election or open and count any challenged ballots until the Board has ruled upon any request for review which may be filed.

(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

- (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

- (2) That the regional director's decision on a substantial factual issue is clearly erroneous on

the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(d) Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record. With respect to ground (2), and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. But such request may not raise any issue or allege any facts not timely presented to the regional director.

(e) Any party may, within 7 days after the last day on which the request for review must be filed, file with the Board eight copies of a statement in opposition thereto, which shall be duplicated and served in accordance with the requirements of subsection (b) of this section; except that if personal service of the request for review is made upon the Board, 10 days will be allowed. However, 3 days will not be added to either of the aforesaid prescribed periods as provided in section 102.114. A statement of such service of opposition shall be filed simultaneously with the Board. The Board may deny the request for review without awaiting a statement in opposition thereto.

(f) The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue

which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

* * * * *

(h) In any case in which it appears to the regional director that the proceeding raises questions which should be decided by the Board, he may, at any time, issue an order, to be effective after the close of the hearing and before decision, transferring the case to the Board for decision. Such an order may be served on the parties upon the record of the hearing.

* * * * *

(j) Upon transfer of the case to Board, the Board shall proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or further hearing, as it may determine, to decide the issues referred to it or to review the decision of the regional director, and shall direct a secret ballot of the employees, dismiss the petition, affirm or reverse the regional director's order in whole or in part, or make such other disposition of the matter as it deems appropriate.

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E. ROBERT SEEVER, CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM, 1970

No. 370

**MAGNESIUM CASTING COMPANY,
PETITIONER**

v.

**NATIONAL LABOR RELATIONS BOARD
RESPONDENT.**

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

**PETITION FOR RECONSIDERATION
OF DECISION OF COURT DELIVERED ON
FEBRUARY 23, 1971**

LOUIS CHANDLER
Attorney for Petitioner
Magnesium Casting Company
79 Milk Street
Boston, Massachusetts

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1970

No. 370

MAGNESIUM CASTING COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR RECONSIDERATION
OF DECISION OF COURT DELIVERED ON
FEBRUARY 23, 1971

Issue

On the basis that the opinion of the Court failed to consider certain arguments argued by the petitioner, is the Petitioner entitled to reconsideration of the decision of the

Honorable Court that the National Labor Relations Board is not required to give at least plenary review to the regional director's representation determination before issuing an unfair labor practice order based on that determination?

Background

A Regional Board employee conducted an investigation which took the form of a hearing not subject to the rules of evidence pursuant to the Statements of Procedure of the Board.¹

The hearing officer transmitted an analysis of the issues and evidence but made no recommendations.²

The regional director made findings of credibility without having observed the witnesses. (A. 110)

Argument

The court has premised its opinion on its understanding of the legislative intent permitting the Board to delegate its authority in representation cases to regional directors under section 3(b) of the Act.³ The opinion of the

¹ Statements of Procedure, Series 8, AS AMENDED, Part 101 Subpart C —

Representation Cases, Section 101.20. (C) which states in relevant part:

"The hearing, usually open to the public, is held before a hearing officer who normally is an attorney or field examiner attached to the regional office but may be another qualified official. The hearing, which is nonadversary in character, is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case."

² Statements of Procedure, Section 101.21 (b).

³ Section 3 b of the Act, 29 U.S.C. § 153 (b):

"The Board is also authorized to delegate its regional directors its powers under Section 9 to determine the unit. . . ."

court indicates that its understanding of the legislative purpose is less than certain when it states —

“or perhaps Congress was primarily motivated by a desire to lighten the Board’s workload.” (page 5 of Court opinion in case at bar)

These are two areas of concern that warrant reconsideration.

The first involves the reference by the court to an excerpt from Senator Goldwater’s statement as to the legislative history.⁴

The second involves the failure of the court to require the Board to conform with the requirements of the Act to separate and different evidentiary standards distinguishing representation cases from unfair practice cases.⁵

A. LEGISLATIVE HISTORY

It is submitted that the court rather than citing the Board’s excerpt from Senator Goldwater’s explanation should have based its opinion on the broad range of legislative discussions referred in the brief of the petitioner⁶ which support its contention that the delegation of representation matters to the regional director did not carry with it the right of the regional director to make a finding which would be final in an unfair practice case.

Congressman Griffin, not only a member of the confer-

⁴ II Legislative History, Labor-Management Reporting and Disclosure Act of 1959 (GPO 1959), p. 1856.

“ The regional director can exercise no authority in representation cases which is greater or not the same as the statutory powers of the Board with respect to such cases. ”

⁵ Sections 9 and 10 of the National Labor Relations Act as amended, 61 Stat. 136, 73, Stat. 519, 29, U.S.C. § 153.

⁶ Brief of Petitioner, Pages 22, 23.

ence committee, but also a co-sponsor of the bill stated in the Conference Report:

"Section 701(b) authorizes the National Labor Relations Board to delegate to its regional directors certain powers *under section 9 pertaining to representation cases. . . . It shou'd be emphasized that the section relates only to representation matters. . . .*"⁷

Congressman Barden, one of the conferees, stated:

"The conferees adopted a provision that there should be some consideration given to *expediting the handling of some of the representation cases. . . .*"⁸

He also stated:

"... The Board may delegate to the 23 regional directors full authority to handle and conduct these election cases . . . thus enabling the Board to expedite its remaining cases. . . ." ^{8a}

Congressman Udall stated:

"... (3b) will enable the NLRB to handle more cases and to handle them more expeditiously, *by decentralizing its supervision of elections. . . .*"⁹

Congressman Morse stated:

"The possibility of overloading the Board is significantly countered by permitting regional directors to

⁷ 2 NLRB Legislative History 1811 (3).

⁸ 2 NLRB Legislative History 1714 (3).

^{8a} 2 NLRB Legislative History 1830 (2).

⁹ 2 NLRB Legislative History 1722 (3).

decide representation cases. . . .” (as distinguished from unfair practice cases.¹⁰

Congressman Smith discussed the concern that none of the Board’s functions in unfair practice cases be given to the regional director.¹¹

Congressman Kearns who introduced the original language of the delegation of authority which was ultimately adopted as section 3(b) stated:

“ . . . The Board is authorized to delegate to its regional directors the *processing of representation cases*. Such cases account for more than 50 per cent of the Board’s workload. . . . This change of procedure will materially decrease the *time spent in processing representation cases*. . . .”¹²

Senator Douglas stated:

“ . . . (Under 3(b)) the Board is authorized to delegate its regional directors *its powers under Section 9*. . . .” (not under Section 10 dealing with unfair practices).¹³

Thus, it is apparent that the Congressional debates preceding the adoption of 3(b) revealed a purpose to expedite only representation cases which are non-adversary by statute; the resolution of unfair practice cases was reserved exclusively to the Board because of the adversary nature of such cases.

It is significant that the Board, when it directed the attention of the court in argument to the statement by Sen-

¹⁰ 2 NLRB Legislative History 1327 (2).

¹¹ 2 NLRB Legislative History 1465 (2) (3).

¹² 2 NLRB Legislative History 1749 (3) - 1750 (1).

¹³ 2 NLRB Legislative History 1856 (2).

ator Goldwater in explanation of legislative intent, failed to include in the quote — and only the quote by the Board was referred to in the opinion of the court — the following comment by the Senator when he subsequently explained what he meant by expediting “disposition of cases”:

The Senator stated that he had in mind

“... contested representation cases. . . .” (i.e. not unfair practice cases).¹⁴

The decision by the Board and in the opinion of the court of this essential portion of the Senator’s explanation is not insignificant.

Thus, there is no legislative intent indicated or stated, directly or indirectly, to affect the absolute duty which it had previously imposed on the Board in Section 10 to review the disposition of unfair practice cases.

“When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.” (*Botany Worsted Mills v. United States*, 278 U.S. 282 (1929) at 289.)

The delegation of Section 9 power did not carry with it the right to delegate the Section 10 responsibility of the Board. See *Cudahy Packing Co. v. Holland*, 315 U.S. 357 (1942).

Under Section 10 of the Act the Board is required to process unfair practice cases on a different basis than representation cases which arise under Section 9 of the Act. The delegation to the regional director of representation matters in fact was intended to lighten the *representation* case load of the Board so it could properly process *unfair*

¹⁴ 2 NLRB Legislative History 1856 (2).

practice cases. The Board's Statements of Procedure establish differing methods for handling the two types of cases.¹⁵

So, too, the Rules and Regulations of the Board differ as to the two types of cases.¹⁶

No reference is made in the opinion of the court to help hurdle the ukase in Section 10(b) of the Act which states explicitly as to unfair practice charges:

"The person so complained of shall have the right to . . . give testimony. . . . Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the District Courts of the United States under the rules of civil procedure. . . ."

Many representation cases are concluded with the election and the certification of results. In so far as this has been accomplished, the legislative purpose has been effectively achieved. But in those cases which subsequently grow into adversary unfair practice cases, it is submitted that there

¹⁵ Statements of Procedure, Series 8, AS AMENDED — Part 101
 Subpart B — Unfair Practice cases under Section 10.
 Subpart C — Representation cases under Section 9.

¹⁶ Rules and Regulations of the NLRB, Series 8, AS AMENDED — Part 102

Subpart B — Procedure under Section 10 (as to) Unfair Practice cases

"Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C)."

Subpart C — Procedure under Section 9(c) concerning Representation.

" Sec. 102.66. . . . *The rules of evidence prevailing in courts of law or equity shall not be controlling. . . .*"
 (emphasis supplied).

is no scintilla of legislative history, nor was there the slightest indication in congressional debate, that implicit in the 3(b) delegation of Section 9(c) representation election cases was an intent to amend Section 10(b) or 10(c). If 10(b) were to be applied in the manner suggested by the Board—presumably with court approval although the opinion of the court makes no mention of 10(b)—then parties who anticipate evidentiary credibility issues may be reluctant to present evidence at a hearing to any person but the one who under the Board rules ultimately could make the credibility finding, i.e., the regional director, which would make for inordinately large case backlogs.

B. THE ADMINISTRATIVE HISTORY OF THIS CASE DISCLOSES THAT THE PETITIONER HAS BEEN DEPRIVED OF THE PROCEDURAL DUE PROCESS GUARANTEED BY STATUTE TO AN ACCUSED IN AN UNFAIR LABOR PRACTICE PROCEEDING.

(a) The application of the Board's "Rule Against Relitigation" deprived petitioner of the administrative rights and protections guaranteed to parties accused of unfair labor practices by the Administrative Procedure Act and by the Labor Management Relations Act.

Although representation proceedings are expressly exempted from the protections of the Administrative Procedure Act (herein called the "APA" by Section 5(A) thereof) 5 U.S.C.A. § 554(a)(5), it is clear beyond any doubt that unfair labor practice proceedings are within the coverage of that Act. This APA coverage includes the following procedural rights, all of which have been denied petitioner by the Board's application of its rule against relitigation:

- (1) Right to a hearing at which "the proponent of a rule or order [has] . . . the burden of proof." Section 7(c) of APA, 5 U.S.C.A. § 556 (D);

(2) Opportunity, prior to decision, to submit for the consideration of the officers participating in such decision proposed findings and conclusions and supporting reasons for such proposed findings or conclusions. Section 8(b) of APA, 5 U.S.C.A. § 557 (C);

(3) Right to have the record show the ruling upon each such finding or conclusion presented. *Ibid.*;

(4) Right to have presiding at the taking of evidence either the agency, one or more members of the body which comprises the agency, or one or more independent hearing examiners appointed as provided in Section 11 of the APA, 5 U.S.C.A. § 556(B);

(5) Right to have the same officer who presided at the reception of evidence make the recommended or initial decision. Section 5(c) of APA, 5 U.S.C.A. § 557(B);

(6) Assurance that the deciding officer shall not consult with any person on any fact in issue unless upon notice and opportunity for all parties to participate. *Ibid.*

In addition, it should be emphasized that the Act and the rules and regulations issued pursuant thereto duplicate many of the APA safeguards listed above, *e.g.*, (i) Section 10(c) of the Act, 29 U.S.C. § 160(c), places the burden upon the General Counsel to prove the unfair labor practice charge by "the preponderance of the testimony taken"; (ii) NLRB Rules and Regulations § 102.42, 29 C.F.R. § 102.42 gives any party the right to file proposed findings and conclusions, or both, with the trial examiner before the latter's decision is handed down; (iii) the statutory scheme contemplates that the same officer who hears the evidence in the complaint case, *i.e.*, the trial examiner, will also make the recommended decision.

These enumerated rights do not exist in a vacuum, but

are part and parcel of specific Congressional policy decisions made in response to the problems posed by the emergence of federal administrative agencies as the "fourth branch" of the federal government. They exist in order to insure that the rights of private litigants will not be sacrificed in favor of the need for the expeditious determination of individual cases.¹⁷

(b) *There is a basic distinction between representation cases and unfair practice cases.*

(1) There is no burden whatsoever upon the Board or its agents in representation proceedings. The only "standard" being whether "a question of representation exists." Section 9(c)(1) of NLRA, 29 U.S.C. § 159(c)(1). In the instant case, this distinction has resulted, in effect, in the Company's being required to prove that the assistant foremen in question are not employees. Certainly this is a far cry from the proposition that the burden in the complaint case is upon the General Counsel to prove unfair labor practice charges by sufficient evidence "and is not upon the employer to disprove them" *Wellington Mil Div. West Point Mfg. Co. v. NLRB*, 330 F. 2d 579, 585 (4th Cir.) cert. denied, 379 U.S. 882, 85 S. Ct. 144 (1964). Nowhere in its "Decision and Order" in the unfair labor practice proceeding in this case does the Board make any finding that the General Counsel has sustained his burden of proof in accordance with the Section 10(c) standard.

(2) The fact that petitioner has no way of ascertaining how the credibility resolutions were made upon the partially conflicting evidence introduced at the representation hearing is closely related to its being subjected to the provisions

¹⁷ For a discussion of the history and policies underlying the passage of the APA, see *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 73 S. Ct. 570 (1953).

of NLRB Rules and Regulations § 102.66(f), 29 C.F.R. § 102.66(f), which authorizes the hearing officer in the representation proceeding to "submit an analysis of the record to the regional director . . ." — an "analysis" which does not become part of the official record in either the representation proceeding or the complaint proceeding. Petitioner has no way of determining whether such an analysis was made, the contents thereof, and/or whether the Acting Regional Director agreed or disagreed with any credibility resolutions made by the hearing officer.¹⁸ Petitioner has never had an opportunity to respond or except to the findings contained in this inscrutable "analysis". This procedure, under which such *ex parte* communications are authorized, is contrary to the provisions of Section 5(c) of the APA, 5 U.S.C.A. § 557(b) and of Section 7(d) of the APA, 5 U.S.C.A. § 556(e), which provides that "the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the *exclusive* record for decision . . ." (Emphasis added).

(3) Although parties to representation proceedings are authorized by the Board's Rules and Regulations to file a post-hearing brief to the Regional Director prior to the latter's decision, their position at this stage is not unlike the game of "blind man's bluff," since they have no way of knowing what the basis for that decision will be. Moreover, the Regional Director's decision, when issued, is expressly made "final" subject to the severely limited possibility that the Board may grant review. Accordingly, where, as here, such review is denied and, subsequently, in the unfair labor practice proceeding, the rule against relitigation is applied by the Board, petitioner has been deprived of the right guaranteed by Section 8(b) of the APA, 5 U.S.C.A.

¹⁸ On the potential importance of credibility resolutions by the one who actually hears the evidence in general, see e.g., *Amco Elec. v. NLRB*, 358 F. 2d 370 (9th Cir. 1966).

§ 557(c) and Section 10(c) of the NLRA, 29 U.S.C. § 160(c) to be fully informed as to the issues and proposed grounds of decision and to be heard upon those issues and grounds prior to any final decision. *Kroblin Refrigerated Express, Inc. v. United States*, 197 F. Supp. 39, 45 (N. D. Iowa 1961) (3 Judge District Court.)

(4) Whereas the trial examiner who conducts the unfair labor practice hearing is an independent "hearing examiner" within the meaning of the APA (the difference in nomenclature being merely historical), whose appointment by the Board under Section 4(a) of the NLRA, 29 U.S.C. § 154(a), is subject to the Civil Service Commission's certifying his eligibility for a hearing examiner position, the "hearing officer" in the representation proceeding is subject to the direct control of the General Counsel, the prosecuting arm of the Board. In addition to the general supervision outlined by the Act, Section 3(d) of NLRA, 29 U.S.C. § 153(d), the General Counsel has "full and final authority on behalf of the Agency over the selection, retention, transfer, promotion, demotion, discipline [and] discharge . . ." of all categories of Board employees who are qualified to sit as hearing officers (i.e., chief law officers, field examiners and field attorneys).

(c) *The combined effect of the Board's limited standard of review in representation cases and application of its "Rule Against Relitigation" in this unfair labor practice case has deprived petitioner of its statutory right to the mandatory, plenary, de novo review which the Board is required to grant to a party accused of an unfair labor practice.*

The Board's limited certiorari type of standard for reviewing a representation decision of a regional director is set forth in its Rules and Regulations, § 102.67(c), 29 C.F.R. § 102.67(c).

In direct contrast to that limited right of review stands the procedure prescribed for the Board's review of a trial examiner's unfair labor practice decision. The latter officer's decision is not final but is merely a "proposal" or "recommendation," 29 U.S.C. § 160(c), which only becomes final "in the event no timely or proper exceptions are filed" thereto, NLRB Rules and Regulations § 102.48, 29 C.F.R. § 102.48.

Petitioner has been prejudiced in this unfair labor practice proceeding, because it has never had the opportunity to have the Board "reverse" a trial examiner, or even the Region Director, based upon its own differing view of the preponderance of the evidence bearing on the "supervisor" versus "employee" issue. Cases are legion in which the Board, for this exact reason, has refused to adopt the findings and conclusions of the trial examiner.¹⁹ The resulting prejudice to petitioner is not obviated by its right to an appellate court review of the Board's "determination," since that right is limited by the substantial evidence rule. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S. Ct. 456, 475 (1951); 10 *NLRB v. Winn-Dixie Greenville, Inc.*, 379 F.2d 958 (4th Cir.)

To summarize, it is impossible for the Board to deny review altogether, as it did in the representation proceeding, to apply its rule against relitigation as it did in the subsequent complaint proceeding, and, at the same time to have afforded petitioner the mandatory, plenary, *de novo* review (to which it was entitled by Section 10(c) of the Act) of the factual findings upon which the bargaining order was based.

¹⁹ See e.g., *Snow v. NLRB*, 308 F. 2d 687 (9th Cir. 1962); *NLRB v. Jackson Maintenance Corp.*, 283 F. 2d 569 (2d Cir. 1960) (Board reversed examiner's credibility resolution); *International Woodworkers of America v. NLRB*, 262 F. 2d 233, 234 (D. C. Cir. 1958) (Board's disagreement with examiner "based on the inferences drawn from the testimony.")

It is clear that the effect of the Board's refusal to review the Acting Regional Director's adverse representation decision and its subsequent application, in the unfair labor practice proceeding, of the rule against relitigation, was a retroactive, unlawful subdelegation to its Acting Regional Director of the Board's decision-making obligation in the unfair labor practice proceeding.

Conclusion

In view of the principles of law herein discussed and the authorities cited, the court should reconsider its decision and grant a rehearing and the Board's decision holding the Company guilty of an unfair labor practice should be set aside, and enforcement of its bargaining order refused or it should remand the case to the Board for further proceedings with appropriate directions.

Respectfully submitted,

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Dated: March 17, 1971